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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KENNETH P. CHOINA, SR.,

Petitioner,

v.

E.I. DU PONT DE NEMOURS & CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

Page

CASES:

Harre v. *A.H. Robins Co.*, 750 F.2d 1501 (11th Cir. 1985) 5
In re Gledhill, 76 F.3d 1070 (10th Cir. 1996) 4
Liljeberg v. *Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988) 6
Oxendine v. *Merrell Dow Pharm., Inc.*, 563 A.2d 330 (D.C. 1989), *cert. denied*, 493 U.S. 1074 (1990) 7, 8
Simons v. *United States*, 452 F.2d 1110 (2d Cir. 1971) 1-3, 8
Viskase Corp. v. *American Nat'l Can Co.*, 979 F. Supp. 697 (N.D. Ill. 1997) 4, 5
Zimmer St. Louis, Inc. v. *Zimmer Co.*, 32 F.3d 357 (8th Cir. 1994) 3

RULES:

Fed. R. Civ. P. 60(b)(3) ..... *passim*
Fed. R. Civ. P. 60(b)(6) ..... *passim*
Fed. R. Civ. P. 60(b), Advisory Committee Note to 1946 Amendment 5, 6

OTHER AUTHORITY:

12 James Wm. Moore, *Moore's Federal Practice* (3d ed. 1997)
§ 60.21[4][c] 6
§ 60.48[6][c] 3
S. Rep. No. 1049, 73d Cong., 2d Sess. (1934) 8

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1. The first question presented is whether Rule 60(b)(6) affords relief for fraud by an expert witness, where neither the party nor his counsel knew of or were involved in the fraud. DuPont attempts to deny the conflict between the Fifth Circuit's holding in this case that relief is available under such circumstances and Judge Friendly's contrary opinion for the Second Circuit in *Simons* v. *United States*, 452 F.2d 1110 (2d Cir. 1971). Opp. 5-8. The conflict is real.

a. Mrs. Simons sought to erase a 22-year-old judgment in a matter to which she had been a party on the ground that she and her late husband had made intentionally false representations to the court. On the question whether these facts constituted grounds for relief under Rule 60(b), the Second Circuit held that "[t]he answer clearly is negative." 452 F.2d at 1115.

Because DuPont disputes the meaning of the critical passage of the court's opinion rejecting Mrs. Simons' argument for relief under Rules 60(b)(3) and 60(b)(6), that passage will be reproduced here:

> Her allegations were of fraud, but she did not allege fraud "of an adverse party," as required by (3), and, in any event, her motions were not made within the required one year after the decrees were entered. She fares no better under the residual clause (6). Since clause (3) permits relief only for fraud of an adverse party and only if the motion is made within one year, it would be reading clause (6) most perversely to say that it authorizes attack for one's own fraud or a non-adverse party's fraud twenty-two years after the judgment. [452 F.2d at 1115.]

Clearly, the court rejected Mrs. Simons' reliance upon Rule 60(b)(3) because the fraud at issue—hers and her husband's—was not that of an "adverse party." As an alternative ground ("in any event"), the court rejected her 60(b)(3) argument because her motion was untimely. With respect to Rule 60(b)(6), the court plainly reasoned that since 60(b)(3) relief is available for an adverse party's fraud, it would be wrong ("perverse") to allow an "attack for one's own fraud" under a "residual clause." In other words, since there was a specific rule for fraud restricted to adverse parties under which Mrs. Simons did not qualify for relief, she could not seek relief under the general catch-all rule.

b. DuPont argues that the Second Circuit rejected Mrs. Simon's 60(b)(6) argument because her motion was "presented far too late." Opp. 7. Yet the Second Circuit began its explanation of the reason why Rule 60(b)(6) was inapplicable with the statement, "clause (3) permits relief only for fraud of an adverse party * * *." If, as DuPont contends, *Simons* holds only that Mrs. Simons' 60(b) motion was untimely, the court would have had no need to discuss, much less rule on, the "adverse party" limitation in Rule 60(b)(3). Clearly, the relationship

between the two rules was the key to the court's logic and holding.

c. DuPont also points out that in *Simons* the fraud was committed, not by a third party, but by Mrs. Simons herself. Opp. 5-6. That distinction is wholly irrelevant. Rule 60(b)(3) relief is restricted to the fraud of an adverse party. If, as we contend, relief for fraud under Rule 60(b) is confined to that situation, it makes no difference whether the fraud at issue is committed by a nonparty (as here) or a nonadverse party (as in *Simons*).

d. DuPont seizes upon the Second Circuit's statement that "[w]hether clause (6) might authorize attack by motion on one's own naturalization by a person tricked or forced into petitioning for it *is a question we need not decide, since Mrs. Simons' motion made no such claim*." Opp. 8 (quoting 452 F.2d at 1115-16) (DuPont's emphasis). DuPont apparently reads this to mean that Mrs. Simons did not rely on Rule 60(b)(6). In fact, the "claim" that Mrs. Simons did not make was that she had been tricked. There is no question that the Second Circuit actually ruled upon the 60(b)(6) issue.

2. As we explained in the Petition, Judge Friendly's reasoning in *Simons* is consistent with the longstanding principle of statutory interpretation that the specific governs the general, while the Fifth Circuit's decision flouts that rule. Pet. 10, 14-16. DuPont makes no attempt to explain why that principle does not apply in the context of Rule 60(b) or to refute cases such as *Zimmer St. Louis, Inc.* v. *Zimmer Co.*, 32 F.3d 357, 361 (8th Cir. 1994). *Zimmer*—a case that DuPont chose not even to discuss—holds that relief is not available under Rule 60(b)(6) for circumstances addressed in Rule 77(d) because the latter rule "addresses specifically the problem." *See also* James Wm. Moore, *Moore's Federal Practice* § 60.48[6][c], at 60-189 (3d ed. 1997) ("the Eighth Circuit [in *Zimmer*] is undoubtedly correct").

DuPont seems shocked by the suggestion that this canon of construction might affect the scope of Rule 60(b), but other courts have applied the canon in the context of that rule without anguish. *See, e.g., In re Gledhill*, 76 F.3d 1070, 1078 (10th Cir. 1996) (rejecting the argument that Bankruptcy Rule 7001(7) trumps Rule 60(b) "because it falls afoul of the fundamental tenet of statutory construction that a court should not construe a general statute to eviscerate a statute of specific effect"). (Note that this interpretive principle does not always operate against the applicability of Rule 60(b). In *Gledhill*, because Rule 60(b) was the more specific rule, it prevailed over a more general rule of bankruptcy.)

3. DuPont argues that it is "well established" that Rule 60(b)(6) reaches the kind of fraud at issue here: *i.e.*, perjury by an expert witness with no involvement by the party or his counsel. Opp. 4. DuPont is wrong.

a. The Fifth Circuit, in support of its assertion that "Rule 60(b)(6) motions are appropriate to remedy fraud by a third-party witness," cited only the Wright & Miller civil procedure treatise. Pet. App. 7a. DuPont relies upon the same source. Opp. 10. In this instance, however, the treatise does not describe the case law accurately. Every court (other than the court below) of which we are aware that has said that Rule 60(b)(6) reaches fraud or perjury by a nonparty or a witness made that statement in dicta. *See* Pet. 12 n.12 (citing four cases). In each of those cases, the court *denied* the requested Rule 60(b) relief. Therefore, whatever those courts said about the circumstances under which such relief is available was not necessary to their decisions. DuPont cites these cases, but does not deny that the statements made in them were dicta.

b. DuPont cites one new case, *Viskase Corp.* v. *American National Can Co.*, 979 F. Supp. 697 (N.D. Ill. 1997), and points out that the *Viskase* court granted relief under Rule 60(b) on the ground of false testimony by an expert witness. Opp. 5 n.4. True, 60(b) relief was granted in *Viskase*; but the problem for DuPont is that it was

granted under (b)(*3*), not (b)(*6*). *See* 979 F. Supp. at 704 ("since I conclude his [the expert's] testimony was materially false, ANC has satisfied its burden under Rule 60(b)(3), Fed.R.Civ.P."). The court invoked Rule 60(b)(3)—and did so properly—because it concluded that the party sponsoring the expert witness was accountable for the fraud. *See* 979 F. Supp. at 705 ("Viskase agrees that it would be bound by an expert's false testimony if it or its attorneys knew the testimony was false. * * * I conclude that Viskase cannot escape responsibility for Dr. Porter's testimony.").

We have no quarrel with the proposition that Rule 60(b)(3) affords relief to a party when a witness' perjury is attributable to the opposing party's counsel. *See, e.g.*, *Harre* v. *A.H. Robins Co.*, 750 F.2d 1501, 1505 (11th Cir. 1985). In this case, however, the district court found to the contrary. *See* Pet. App. 13a (Trappey's "fraud was not committed with the complicity of Plaintiff or his Counsel"). DuPont has never contended otherwise.

4. Looking for a "horrible" to place before the Court, DuPont states that, under our approach, Rule 60(b) does not reach "fraud by anyone other than an adverse party." Opp. 10. We agree. In our view, Rule 60(b)(3), by granting relief for the fraud of an "adverse party" (including any fraud by counsel or a witness that is attributable to such a party), preempts any broader application of Rule 60(b)(6) to fraud by other trial participants. This is far from a radical view.

It comports with the history of Rule 60(b) and with recognized limits on the judicial power to correct a "fraud on the court." Notably, "fraud was omitted from original Rule 60(b) as a ground for relief." Advisory Committee Notes to 1946 Amendment. When the current rule was adopted in 1946, the drafters of the rule added fraud as a ground for relief but limited the scope of relief to the fraud "of an adverse party." If the drafters had wanted the rule to reach anyone's fraud, they would have left out the adverse party limitation. The drafters, moreover, were sensitive to such nuances. The

original version of Rule 60(b) afforded relief to a party for "*his* mistake, inadvertence, surprise, or excusable neglect" (emphasis added). The 1946 Amendment deleted the pronoun to make clear that the rule is not confined to a party's own mistake or neglect. *See* Advisory Committee Notes to 1946 Amendment. Furthermore, it is significant that the inherent power of federal courts to vacate judgments for "fraud on the court" has never reached the perjury of a witness. *See Moore's Federal Practice*, *supra*, § 60.21[4][c], at 60-56 ("Perjury by a party or witness is not fraud on the court"); Pet. 17-19.

5. The second question presented is whether DuPont should have been denied Rule 60(b)(6) relief because of its failure to exercise due diligence in discovering the evidence of Trappey's fraud. DuPont does not dispute that a party may take refuge in Rule 60(b)(6) only if there was no way it could have unearthed the complained of fraud prior to judgment through reasonable diligence. *See Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 863-864 & n.11 (1988); Pet. 19-20.

a. DuPont argues instead that it "took appropriate steps *after* learning of Trappey's perjury," Opp. 11 (emphasis added; quoting Pet. App. 8a), but that is not the issue. The issue is what DuPont did *before* it learned of Trappey's fraud and what it reasonably could have done to discover the fraud in a more timely manner (*i.e.*, before the entry of judgment).

As explained more fully in the Petition, there can be no question but that DuPont was asleep at the switch during discovery. Pet. 20-22. DuPont was led to Trappey's fraud on the basis of two things: the 36 duplicate pages of data and the deposition testimony of Rosha. Although DuPont says it noticed the duplication the night before trial, it obtained the pages of data over three months before trial at Trappey's deposition. At the same deposition, DuPont learned about Rosha. Yet DuPont never questioned Trappey about the data at that deposition or any other deposition and never deposed Rosha until after

trial. If that is diligent behavior, the term has lost all meaning.

b. *Oxendine* v. *Merrell Dow Pharmaceuticals, Inc.*, 563 A.2d 330 (D.C. 1989), *cert. denied*, 493 U.S. 1074 (1990), confirms that DuPont should have been denied relief and shows the error of the Fifth Circuit's decision. In *Oxendine*, the trial court granted a Rule 60(b)(6) motion on the ground that the plaintiff's expert witness, Dr. Done, intentionally gave false testimony at trial. The D.C. Court of Appeals reversed, and applied the following law: "To award a new trial, the evidence must in fact have been newly discovered since the trial, its recent discovery cannot be due to a lack of diligence by the movant, and the evidence cannot be merely cumulative or impeaching but must be such as would probably produce a different verdict if a new trial were granted." 563 A.2d at 334.

DuPont portrays *Oxendine* as having held only that Dr. Done's false testimony was immaterial to the outcome of the case. Opp. 12. That is true with respect to *one* of the six false statements at issue. But as to the *five other* misstatements made by Dr. Done, the court held that the defendant had failed to exercise due diligence in discovering their falsity:

> Five of Dr. Done's statements found by Judge Wolf to be misrepresentations were matters either previously known or readily capable of being learned by appellee in the course of conducting pretrial discovery about Dr. Done's qualifications as an expert. As such, they cannot be considered to have been newly discovered, and the failure to discover them prior to trial shows a lack of diligence by appellee for which it has provided no explanation. [563 A.2d at 334.]

Thus, contrary to DuPont's assertion, the court did squarely hold that these five false statements "were discoverable prior to trial and, consequently, were matters of impeachment which could have been presented to the jury. As such, they cannot form a proper

basis for granting the relief requested by appellee." *Id.* at 335.

The conflict between *Oxendine* and this case could not be more stark. There is no question but that Trappey's fraud was "either previously known or readily capable of being learned by [DuPont] in the course of conducting pretrial discovery." Indeed, DuPont does not even pretend otherwise. DuPont had the data sheets—but did not realize their significance until the night before trial. It knew about Rosha—but did not depose him until after the trial was over. If anything, this is an easier case than *Oxendine* because here DuPont caught on to Trappey's fraud before the trial started and even argued to the jury that Trappey had falsified his data. In sum, DuPont had every opportunity to smoke out Trappey before—and during—the trial. It was error for the courts below to throw out a final judgment because of DuPont's dilatory behavior during discovery and tactical mistakes at trial.

6. Resolution of the foregoing conflicts is a matter of great importance. In perhaps no other area of federal law is the need for uniformity as pressing as in the context of the Federal Rules of Civil Procedure. The purpose of the Rules is to "bring about uniformity" in the conduct of federal court litigation. S. Rep. No. 1049, 73d Cong., 2d Sess. (1934) (quoting letter from Attorney General Homer Cummings). The Federal Rules should not mean one thing in the Fifth Circuit and another in the Second Circuit, or the District of Columbia.

The *Simons* court correctly recognized that the case before it "raise[d] interesting and important questions" of civil procedure. 452 F.2d at 1111. Judge Friendly was right. This Court should grant the writ in order to resolve the important conflict over the interplay between Rule 60(b)(3) and Rule 60(b)(6).

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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